STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2003
v	No. 228264 Wayne Circuit Court
MICHAEL DEGRAFFENRIED, Defendant-Appellant.	LC No. 99-006691

Before: Fitzgerald, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of thirty to fifty years' imprisonment for the second-degree murder conviction and five to ten years' imprisonment for each assault conviction. These sentences were to be served consecutive to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. Ineffective Assistance of Counsel

Defendant raises numerous claims of ineffective assistance of counsel on appeal. Because defendant did not raise these issues before the trial court, our review is limited to error apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Unpreserved error only warrants reversal when it is plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel, and he must overcome the strong presumption that counsel's performance was sound trial strategy; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

A

Defendant initially claims that his trial counsel improperly elicited testimony that Jerry Hunter, a witness for the defense, took a polygraph test and was not charged in the shooting. According to defendant, this was unfairly prejudicial because it suggested that defendant was guilty for not taking a polygraph test.

In *People v Kiczenski*, 118 Mich App 341, 346-347; 324 NW2d 614 (1982), quoting *People v Rocha*, 110 Mich App 1, 8-9; 312 NW2d 657 (1981), this Court noted that a "reference to polygraph examinations need not always constitute reversible error. A reference may be a matter of defense strategy, the result of a nonresponse answer, or otherwise brief, inadvertent and isolated." Considering Mr. Hunter's testimony in context, it is clear that defense counsel did not purposefully elicit testimony concerning the polygraph test. Rather, defense counsel was asking Mr. Hunter about his experience with the police in this case. It further appears that defense counsel was exercising sound trial strategy by attempting to show that the police threatened and coerced people into giving false statements.

B

Defendant next asserts that his defense counsel was ineffective for failing to impeach several prosecution witnesses. However, after reviewing the record, we find no merit to defendant's claims. There were minor discrepancies between Broderick Ward's preliminary examination testimony and his trial testimony; however, they were not enough to affect the outcome of the case. Further, while defense counsel did not use the preliminary examination testimony against Mr. Ward, he used other means to discredit his testimony.

Defendant also claims that his counsel's failure to impeach Stephanie Keeton with her criminal record, as permitted by MRE 609(a), amounted to ineffective assistance. Because the lower court record does not establish the factual basis for this contention, we are unable to review this claim. See *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001). Nevertheless, defendant has failed to show how this alleged error prejudiced the outcome when other witnesses also identified defendant as the shooter.

C

Defendant further opines that defense counsel failed to exercise proper challenges during voir dire. An attorney's decisions relating to juror selection are generally a matter of trial strategy that should not be evaluated with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Furthermore, jurors are presumed to be competent and impartial. *Id.* at 256. After carefully reviewing the record, we find that defendant has failed to overcome these presumptions.

D

Defendant contends that defense counsel should have moved to suppress his statements to the police on the grounds that they were coerced. Defendant actually gave two statements to the police. At trial, defendant admitted that he gave the first statement voluntarily. Consequently, defense counsel was not ineffective for failing to challenge its admissibility. See *Snider*, *supra*

at 425. Moreover, the second statement, which defendant claimed was coerced, was not incriminating. Accordingly, there was no reason for defense counsel to move for its exclusion.

We also disagree with defendant's claim that his counsel committed prejudicial error by calling Detective Hill as a witness. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *Rockey, supra* at 76. Defendant claims that calling Detective Hill as a witness provided the prosecutor with an opportunity to question him about defendant's statement and introduce it into evidence. However, defendant has failed to overcome the presumption of trial strategy. Defense counsel apparently called detective Hill to bolster his claim that the police did not adequately investigate the case. Furthermore, we note that the prosecutor could have called Detective Hill for rebuttal testimony to defendant's alibi. While in hindsight defense counsel's strategy may have proven unsuccessful, this does not mandate a conclusion that counsel rendered ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Similarly, defendant has not overcome the presumption that it was sound trial strategy to call him to testify. See *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986).

E

Defendant next asserts that his trial counsel failed to object to speculative questions attacking his alibi defense. However, it is unclear how these questions prejudiced defendant. A review of the record reveals that detective Hines' testimony did not materially contradict Wilma McDaniel's testimony. In fact, Ms. McDaniel testified that she did not discuss the time frame of her trip to the police department with defendant, other than to say that her grandson, Edward McDaniel, called her from the police station at 12:45 a.m. She admitted that she did not discuss with Detective Hines the crucial times that she and defendant left or returned to the house. Thus, Detective Hines' testimony that he was unable to recall any discussion of times with Ms. McDaniel did not attack defendant's alibi.

Defendant also claims that defense counsel was ineffective for failing to subpoena Officer Kelly to corroborate his alibi. However, the record does not establish that Officer Kelly would have given defendant favorable testimony. Accordingly, we have no basis for concluding that counsel was ineffective on this basis.

F

Defendant further argues that defense counsel erroneously elicited testimony from Boderick Ward that Willie Wimberly was present at the time of the shooting, thereby introducing the only evidence at trial to support the charge of an assault against Mr. Wimberly. This argument is not supported by the record. During direct examination, Mr. Ward twice stated that Mr. Wimberly was part of the group assembled at the house on Florence Street around the time of the shooting.

Defendant raises other claims of ineffective assistance, but did not include them in his statement of the questions presented. Accordingly, these issues are not preserved for appeal. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990).

II. Right to a Public Trial

Defendant next claims that his right to a public trial was violated when the trial court closed the courtroom to spectators during Ms. Keeton's testimony. We disagree. Because defendant did not raise this issue before the trial court, our review is limited to error affecting his substantial rights. *Carines*, *supra* at 763-764.

The federal and state constitution guarantee criminal defendants the right to a public trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). However, in *People v Gratton*, 107 Mich App 478, 481; 309 NW2d 609 (1981), this Court rejected a claim that the trial court violated the defendant's right to a public trial by excluding spectators from the courtroom during the complainant's testimony. Rather, this Court held that "[t]he right to complain about an order of exclusion may be waived either expressly or by an accused's failure to object." *Id.* In the instant case, defendant expressly waived his right by assenting to the trial court's decision to close the courtroom during Keeton's testimony. See *People v Grenke*, 112 Mich App 567, 569; 316 NW2d 494 (1982).

III. Admission of Evidence

Defendant further asserts that the trial court's exclusion of evidence denied his ability to present a defense. We disagree. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

Defendant claims that the trial court should have allowed the jury to hear evidence that a bag of crack cocaine was found in Alondrae Davis' hand. However, defendant did not make an offer of proof regarding this evidence. In order to raise an issue on appeal that the trial court erred in excluding evidence, the party must make an offer of proof showing the substance of the evidence. MRE 103(a)(2); *People v Hampton*, 237 Mich App 143, 154; 603 NW2d 270 (1999). Without an argument as to why the evidence was relevant, we cannot conclude that the trial court erred in excluding it.[1] Furthermore, we are unconvinced by defendant's argument on appeal that the evidence was relevant because it could have shown that Mr. Davis was killed by a rival drug dealer. The mere fact that Mr. Davis was holding crack cocaine when he was shot does not establish that he was a drug dealer or the target of rival drug dealers. See MRE 401; *Aldrich, supra* at 101.

Defendant additionally claims that the trial court erroneously refused his request to present Officer Kelly as an alibi witness. However, the record indicates that Officer Kelly did not testify because he failed to appear and was never subpoenaed by defendant. Consequently, we find no error on the part of the trial court.

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[1] We note that Officer DeVoll actually referred to the crack cocaine during his testimony despite the trial court's ruling.

IV. Jury Instructions

Defendant also maintains that the trial court erroneously instructed the jury regarding the reasonable doubt standard. We disagree. Because defendant failed to object to the trial court's preliminary instruction on reasonable doubt, we review this issue for plain error affecting his substantial rights. *Carines*, *supra* at 763-764.

During preliminary instructions, the trial court informed the jury that reasonable doubt meant "substantially more than fifty-one percent." While this was a gratuitous and misleading comment by the trial court, we find that the error does not affect defendant's substantial rights. *Id*. Indeed, the trial court cleared up any confusion by properly instructing the jury on reasonable doubt pursuant to CJI2d 3.2. This Court has held that CJI2d 3.2 is an accurate instruction on reasonable doubt. *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999).

V. Sufficiency of the Evidence

Defendant ultimately asserts that there was insufficient evidence to support his conviction for assaulting Mr. Wimberly. As such, defendant claims that the trial court should have granted his motion for a directed verdict on this charge. We disagree.

In reviewing a sufficiency of the evidence claim, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). Similarly, "[w]hen reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *Aldrich*, *supra* at 122.

Defendant contends that there was no evidence that Mr. Wimberly was present during the shooting. However, a review of the record shows that Mr. Ward repeatedly stated that Mr. Wimberly was a member of the group assembled at the house on Florence Street. He specifically mentioned that Mr. Wimberly was there half an hour before the shooting and did not testify that Mr. Wimberly left before the shooting occurred. On cross-examination, Mr. Ward identified Mr. Wimberly as being with the group during the shooting. A reasonable juror could have inferred from this testimony that Mr. Wimberly was with the group during the shooting. Consequently, there was sufficient evidence to convict defendant of this charge.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper